U.S. Contractors, Inc., and The Dow Chemical Company, U.S.A., Texas Division *and* International Union of Operating Engineers, Local 564, AFL-CIO. Case 23-CA-7426

September 3, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 4, 1980, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, Respondent U.S. Contractors filed exceptions and a supporting brief; the General Counsel filed limited exceptions, a supporting brief, and an answering brief to Respondent Dow Chemical's exceptions; the Charging Party filed limited exceptions and a supporting brief; and Respondent Dow Chemical filed cross-exceptions, a supporting brief, and an answering brief to the General Counsel's and the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

1. We agree with the Administrative Law Judge's determination that Respondent U.S. Contractors (hereafter referred to as USC) violated Section 8(a)(1) of the Act by threatening its employees with the loss of their jobs if they voted in favor of the Union.

2. We also agree with the Administrative Law Judge's conclusion that Respondent USC and Dow Chemical (hereafter referred to as Dow) are not joint employers. We further agree that the allegation that Respondent Dow acted in concert with Respondent USC to cancel the custodial contract in violation of Section 8(a)(3) and (1) of the Act should be dismissed.

3. Our first disagreement with the Administrative Law Judge concerns his dismissing all charges of 8(a)(1) violations against Respondent Dow. We find that a statement made by Dow Supervisor Bartlett to USC employee Mack that if the USC janitors unionized they would "definitely go out the gate" would reasonably tend to interfere with employees' exercise of Section 7 rights in violation of Section 8(a)(1). Bartlett admitted that he openly related unionism to job uncertainty, and Mack's testimony about this conversation with Bartlett was credited by the Administrative Law Judge. We therefore reverse the Administrative Law Judge, and find that this statement violated Section 8(a)(1) of the Act.

4. Our major disagreement with the Administrative Law Judge concerns his findings that Respondent USC violated Section 8(a)(5) and (3) of the Act. The complaint alleges that on February 14, 1979, USC failed and refused to bargain with the Union over its decision to cease operating its janitorial division and lay off its entire janitorial work force. It further alleges that USC thereafter refused to bargain about the effects of this decision upon the terminated employees. The General Counsel attempted to establish that this decision was motivated by union animus and a desire to retaliate against its custodial employees for choosing to be represented by a union.

The Administrative Law Judge pieced together a highly coincidental sequence of events, occurring during the approximately 6 weeks between the date of the Union's victory in the representation election and February 14, 1979, to conclude that USC's actions violated the Act. While we agree that these events raise suspicions about the lawfulness of USC's conduct, the record evidence fails to prove that USC acted unlawfully.

USC is engaged primarily as a mechanical and maintenance contractor in the petrochemical industry. It employs approximately 1,400 persons in the building and construction trades. In 1972, at the request of Dow, for whom USC was already providing construction work, USC expanded into the custodial services business. However, USC limited its custodial contracting to this single operation at Dow. Its entire custodial work force consisted of 60 employees. This janitorial operation was governed by yearly purchase-order contracts between USC and Dow, the last of which was executed on December 29, 1978, 1 day after the USC janitorial employees voted in favor of union representation.

The Administrative Law Judge imputed unlawful motives to USC's actions following the Union's election victory. He determined that its January 18, 1979, request for a rate increase, occurring so shortly after entering into the purchase order contract and the Union's certification, was an attempt to drive up Dow's costs and force Dow to seek alternative, less costly janitorial services—thereby providing USC with a convenient and powerful

[1] Respondent U.S. Contractors, the Charging Party, and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

bargaining weapon. He found further support for his theory in USC's subsequent request for retroactive application of the rate hike, reasoning that Dow predictably would be unwilling to expend the amount of money necessary to meet this request. On this basis he concluded that USC's efforts to avoid bargaining with the Union and retaliate against its employees for unionizing culminated with its opening remarks at the February 14, 1979, meeting with the Union. He determined that USC's announcement that it was contemplating the cessation of its janitorial operation because of the increased financial burden created by Dow's refusal to apply the rate increase retroactively and Dow's decision to cut back the number of hours of work scheduled for USC's janitors constituted the fruition of weeks of scheming to achieve this end. The Administrative Law Judge concluded that these facts establish that USC failed to fulfill its obligation to notify the Union of its plan to end its janitorial operation and the effects of such decision on the employees who would consequently lose their jobs.

We agree with Respondent USC's contention that the 8(a)(5) and (3) findings of the Administrative Law Judge cannot stand. The Administrative Law Judge found, but inexplicably failed to consider, that USC's legal counsel and chief spokesman during the February 14 session recognized and advised the other USC representatives of the necessity of bargaining about its ultimate decision whether to cancel the remaining term of the custodial contract and the effects that this decision would have on its employees. The Administrative Law Judge also failed to recognize that USC entered the meeting fully prepared to discuss with the Union this turn of events and that it was the union team which abruptly ended the meeting with the comment that there was nothing left to discuss. USC did not announce to the Union that it had irrevocably decided to end its custodial operation, but rather it recounted a series of factors which pointed to this result and requested discussion and response from the Union. The Union did not avail itself of the opportunity and left the meeting room. It was after the meeting had concluded in this manner that USC notified Dow that it would terminate its custodial services effective March 17, 1979. The record clearly establishes that USC did not seek to avoid bargaining over its decision to terminate the custodial division, but rather it was the Union which misinterpreted the situation as a *fait accompli* and failed to negotiate about the issue. Therefore, we conclude that Respondent USC did not fail to bargain over this decision. *Edward Axel Roffman Associates, Inc.*, 147 NLRB 717 (1964). Further, we conclude that USC cannot be found to have violated the Act by failing to engage in effects bargaining for the simple reason that at no time subsequent to this decision did the Union ever request that such bargaining take place.[2]

Moreover, we conclude that, even if the Union had been correct in its belief that USC had decided unilaterally to discontinue its involvement in custodial contracting, we would still not find that Respondent violated the Act because that decision was prompted solely by economic reasons. Controlling this case is the Supreme Court's recent decision in *First National Maintenance Corp.* v. *N.L.R.B.*,[3] wherein the Court held that, when economic reasons compel an employer to decide whether or not to shut down a part of its business, the employer's need to operate freely outweighs any incremental benefit that might be gained through a union's participation in the decisionmaking. The Court assessed the relative needs of unions and employers in such circumstances and found that the myriad factors an employer must consider and be prepared to respond to necessitate unencumbered freedom of operation. While recognizing that unions have legitimate concerns about job preservation, the Court concluded that economic exigencies faced by an employer, which may hinge on timing, secrecy, and flexibility of action, necessitate untrammeled authority to act.

Under the circumstances presented in the instant case, USC was terminating its custodial business entirely and was not required to consult with the Union prior to exercising its management prerogative in this regard. USC maintained a single, small custodial contracting operation within its construction and maintenance enterprise. In deciding to terminate this one operation, it ceased to engage in the custodial contracting business.

Following similar reasoning and closely tied to our conclusions above, we find that no 8(a)(3) violation has been established. USC's motivation in terminating the janitorial employees was purely economic and not a subterfuge to avoid bargaining with the Union. Much like the situation presented in *Thompson Transport Company, Inc.*,[4] we are faced with suspicious circumstances lending an appearance of illegality to Respondent's conduct. However, an examination of the record reveals that the unfavorable economic prospects of continuing to engage in a particular business undertaking rather than discriminatory reasons led to the cessa-

[2] See *Motoresearch Company and Kems Corporation*, 138 NLRB 1490 (1962); *White Consolidated Industries, Inc.*, 154 NLRB 1593 (1965); *International Offset Corp., et al.*, 210 NLRB 854 (1974).

[3] No. 80-544 1981).

[4] 165 NLRB 746 (1967).

tion of the enterprise. In the instant case, the marginal profitability of the janitorial division had turned into a loss, which climbed to nearly $24,000 during the 12 months between June 1978 and May 1979. In addition, Dow had cut by one-third the number of hours of work allotted to the USC janitors, contributing to greater overhead costs and exacerbating the financial difficulties of the operation. In a last effort to get out of this plight, USC asked for a retroactive rate increase. Dow's rejection of this request sealed the financial fate of the janitorial division[5] and dictated the course which USC's directors would take. For these reasons, therefore, we are convinced that USC's actions in terminating its custodial division employees were not motivated by unlawful considerations, but were founded upon substantial economic factors causing the unprofitability of pursuing the endeavor further.

Accordingly, we shall dismiss the 8(a)(5) and (3) allegations against Respondent USC.

CONCLUSIONS OF LAW

1. U.S. Contractors, Inc., and The Dow Chemical Company, U.S.A., Texas Division, are each employers within the meaning of the Act.
2. International Union of Operating Engineers, Local 564, AFL-CIO, is a labor organization within the meaning of the Act.
3. Local 564 was, until USC discontinued its custodial operation, the exclusive bargaining representative of USC's custodial employees.
4. Respondent Dow did not violate Section 8(a)(3) and (1) of the Act by acting in concert with Respondent USC in canceling a custodial contract to be performed by USC's employees at Dow's facility.
5. Respondent USC did not violate Section 8(a)(5), (3), and (1) of the Act by discontinuing its custodial operation and laying off its custodial work force.
6. Respondent USC violated Section 8(a)(1) of the Act by threatening employees with job losses as a consequence of selecting the Union as their representative.
7. Respondent Dow violated Section 8(a)(1) of the Act by threatening USC's employees that USC's employees would "go out the gate" if they unionized.
8. The unfair labor practices enumerated above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respodent USC and Respondent Dow have violated Section 8(a)(1) of the Act by various threats to the job security of USC's employees, we shall order each Respondent to cease and desist from threatening employees with loss of their jobs for selecting the Union as their collective-bargaining representative.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent U.S. Contractors, Inc., Clute, Texas, and Respondent Dow Chemical Company U.S.A., Texas Division, Freeport, Texas, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully threatening employees of Respondent U.S. Contractors, Inc., with loss of their jobs for selecting the Union as their collective-bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action found necessary to effectuate the policies of the Act:

(a) Post at their respective plants in Clute and Freeport, Texas, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondents' authorized representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in all other respects be, and it hereby is, dismissed.

[5] We wish to emphasize at this point that we have affirmed the Administrative Law Judge's finding that Dow's relationship with USC was a purely arm's-length business association and that there is no evidence that Dow unlawfully conspired with USC to cut back on the hours assigned to the USC custodians or to deny retroactive application of the rate increase.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten employees with loss of their jobs for selecting the Union as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

U.S. CONTRACTORS, INC., AND THE DOW CHEMICAL COMPANY

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at Angleton, Texas, over November 27-30, 1979, based on an amended complaint alleging that U.S. Contractors, Inc., herein called USC, and The Dow Chemical Company, U.S.A., Texas Division, herein called Dow, acting in concert, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by canceling a custodial contract to be performed at Dow's Freeport, Texas, facility with the result that all custodial employees of USC were terminated, assertedly done because USC's employees were represented by International Union of Operating Engineers, Local 564, AFL-CIO, herein called the Union, and for the purpose of chilling unionism among the employees of various other contractors, and that USC otherwise violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union since on or about March 17, 1979, after interfering with, restraining, and coercing employees through various utterances of its supervisory agents.

Upon the entire record,[1] my observation of the witnesses, and consideration of post-hearing briefs, I make the following:

FINDINGS OF FACT AND RESULTANT CONCLUSIONS OF LAW

This case concerns Plant B of an enormous petrochemical complex operated by Dow.[2] Dow employs 7,200 persons throughout the sprawling facility,[3] and numerous construction, maintenance, or specialty contractors are constantly engaged in performance of services at the premises. The relationship of such firms to Dow arises under either an "A & B" form contract, one providing for continuous (often annual) performance, or a "lump sum" contract awarded for a specific undertaking. Dow maintains separate gates through which union and nonunion contractor employees respectively pass to enter the facility. USC is principally a nonunion mechanical contractor employing approximately 1,400 persons in many building and construction trades, about half of whom are frequently on assignment at the complex pursuant to awards made by Dow's purchasing department.

USC has performed custodial services at Plant B for several years. The most recent complete contract was one let on December 30, 1977, as A & B-43594-PO9. It called for USC to "FURNISH LABOR, TOOLS AND EQUIPMENT TO PERFORM JANITORIAL WORK FOR PLANT B, as and when requested by Dow Supervision." An attachment detailed the basis of "work [to be] performed" including an inversely changing "man-hour rate" as total weekly billing hours increased, and the particulars of overtime, employment tax apportionment, equipment rental, responsibility for furnishing expendable cleaning supplies, plus an acknowledgment of holidays to be observed. This attachment specified that quoted rates "include all transportation, salaries, wages, insurance premiums (if any), office personnel, profit and overhead."

In August 1978 custodial employees Bonnie Anderson and Sally Carlson made contact with Bobby Smith, business agent of the Union, and an organizing effort was commenced.[4] A representation petition was filed on September 29, resulting in direction of an election that was held on December 28. A vote of 35 to 11 favored the Union, and its certification as exclusive collective-bargaining representative was issued on January 8. As this ensued NLRB Case 23-CA-7425 was in process, upon which a settlement agreement was reached on January 23 in relation to various allegations of USC having violated Section 8(a)(1). As typically so, the settlement required posting of a notice which recited that offers of employment had been made to four persons (including Anderson and Carlson) with backpay also running to certain of the group.

The custodial work force of about 60 persons was managed by Ronald Steinbach. For the period November 20 to February 16 he was assisted by Edward Roddy, whose duties "were roughly the same as his . . . to coordinate the janitorial duties of each janitorial employee, to deal with both employees and customers." As election date on the RC case approached, Roddy occa-

[1] Errors in the transcript have been noted and corrected.

[2] Respondent USC is a Texas corporation with principal office and place of business located in Clute, Texas, where it is engaged in providing maintenance and construction services for the petrochemical industry, annually purchasing and receiving goods and materials valued in excess of $50,000 which are shipped to its Texas facility from outside that State. Respondent Dow is a Delaware corporation with an office and place of business located in Freeport, Texas, where it is engaged in the manufacture of various chemical products, annually selling and shipping goods and materials valued in excess of $50,000 directly from its Texas facility to firms located outside that State. On these admited facts I find that USC and Dow are each employers engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and that otherwise the Union is a labor organization within the meaning of Sec. 2(5).

[3] Of this number, approximately 600 persons function as first-line supervisors. Further, Dow deals with a total of six different labor organizations, the largest of which is the Union herein with a bargaining unit of just over 2,000.

[4] All dates and named months hereafter falling in July through December are 1978; those falling in January through June are 1979 unless in either case expressly shown otherwise.

sionally spoke about it with employees. Colena Hall testified that in early December, while in a company van with Roddy, he said that Dow did not want USC's custodial employees to vote in a union and their resolve was so great that it scared him to death. Hall added that the subject led to argument between employee Glenda Kelly and Roddy, causing him to remind her of how few union people were coming through the gate reserved for such contractors. Bessie Robinson and Sara Mack were each present and the latter credibly corroborated his expressing that he would not vote for the Union because Dow did not want a union.[5] Gloria Dunlap testified that about a week before the election Roddy had separately told her that employees would lose their jobs if they went union, again associating this to Dow opposing the presence of union contractors and that a predecessor company to USC had been eliminated because its employees became represented by a union.[6] Carlson testified that on December 27 she was spoken to by Roddy, who said he felt the women would lose their jobs if they went for the Union.[7] She added that he repeated the theme of how this matter scared him, and that advent of the Union would even cause him to face working outside in rain and cold weather.[8]

Roddy testified that he was solicited by USC for the job he had held, and that upon reporting for work on November 20 he was advised by both Harton and Raymond Kalmans, whose law firm was then representing USC in regard to the representation case, that he was not to campaign among employees, should confine himself to answering questions, should not interrogate employees, and should generally comply with a written set of instructions to supervisors on the subject. As to the various utterances Roddy recalled the episode described mainly by Hall, testifying it was one of several group discussions he had with employees prior to the election. He asserted that on this occasion custodial employee Glenda Kelly had opened discussion with a question about what was likely to happen, which he shrugged off adding when she alluded to the contractor gate signs that listed employers meant only they were authorized to enter and did not necessarily mean that they were currently working with active employees. He recalled refining this explanation by saying that a proper comparison would be to count the number of timecards at respective gates.[9] Roddy denied stating at this time that the situation scared him, that Dow did not want a union, or that employees would lose their jobs for voting one in. As to Dunlap's testimony, Roddy recalled talking occasionally with her and, while not recalling the precise conversation she described, did deny ever saying to her that the employees would lose their jobs if they voted for the Union. Roddy had no recollection of a conversation with Carlson on December 27.

Kalmans had assumed chief responsibility for representing USC during the preelection period, and in this connection made several trips there from his Houston office. Custodial Supervisor Lillie Beasley testified that on or about December 1 she was directed to a company office where Kalmans spoke with her about possible reasons for the janitors desiring representation, adding that since neither Dow nor USC wanted a union he was quite sure the custodial contract would not be renewed should the Union eventuate and all persons so employed would lose their jobs. Beasley added that Kalmans illustrated this by reference to the Ramirez Company, holder of the custodial contract at Dow's Plant A, as having backup flexibility since it performed custodial work independent of Dow at banks and schools.[10] At Beasley's next opportunity that day she spoke with several custodial employees including Flora Ward and Dorothy Morgan, telling them that a company attorney had just said they would lose their jobs for voting in the Union by reason of Dow's expected contract cancellation and that this situation definitely contrasted with the more assured future faced by persons employed with Ramirez.

On December 27 all custodial employees were assembled at a conference room on Dow premises where Steinbach and Monical successively spoke to them.[11] A tape recording of this meeting was entered in evidence; however, controversy exists as to precisely what was said and this cannot be resolved because of the tape's inadequate quality. Further evidence was received from both the General Counsel and USC in the form of their respective transcribed versions of the tape's contents. A high degree of similarity is present between these two versions, and for convenience I set forth below pertinent excerpts from that of USC:[12]

[5] See fn. 1, *supra*.

[6] The executive hierarchy of USC as of December included Lynn Dennis Monical as president and several others of that surname as officers. Bill McIntyre, a cofounder and former president, was then in charge of inside engineering and officer Ernie Rea was responsible for administration. Jim Barton was manager of maintenance and services with overall responsibilities constituting him the immediate superior of Steinbach. Up until approximately 10 years ago Monical's father had been active as a contractor of that vicinity in a business named Monical & Powell.

[7] USC's working custodians at the time were primarily (if not exclusively) female.

[8] Carlson also recalled a subsequent conversation with Roddy while the two were alone in which he expressed shock over the outcome of the election, and that he did not think Dow would renew the custodial contract.

[9] Monical believed at the time that there were approximately 90 cards at gate 38 (the union gate) and 1,400 at gate 40 (the nonunion gate).

[10] Kalmans' version is that on December 6 he conferred with Beasley about any underlying causes of employee discontent, but did not tell her the women would lose their jobs if the Union got in. After making this absolute denial, Kalmans added that he did discuss his client's vulnerability because the operative purchase order was on a year-to-year basis, and during cross-examination admitted to communicating to supervision that in his opinion Dow would be free to cancel the contract of USC in the event its employees voted for representation by the Union.

[11] Steinbach's portion dealt primarily with mechanics of voting as scheduled for the following day. Monical's portion, estimated to last about 8 minutes, opened with jollying remarks, retraced the Company's experience under the custodial contract during 1978, covered general background of the Monical family and its past business dealings with Dow, and decidedly pitched for a vote against the Union. Both Steinbach and Monical took questions after the uninterrupted portion of their talks. In the course of all this there was reference to a yet earlier speech by Barton, the content of which is not at issue here.

[12] The taped portion of Monical's remarks only was played for my benefit during off-the-record proceedings with all counsel present and consenting. This yielded no real progress toward any finding of fact, amounting instead to a better appreciation of inflection and dialect (similar in this regard to Monical's manner of speech as a witness) than would have been received by the original listeners.

Real quickly let me share something with you—a personal experience. Now, I know many of you and uh you know me. I've lived here all my life and contrary to popular belief I wasn't born with a gold spoon in my mouth. In fact my family was so poor the poor people called them poor. That's a fact. My dad worked hard. They had a company named Monical & Powell. It started out a little home building company and uh my dad worked [unintelligible] and he got in Dow Chemical, he got in Monsanto, he got in Union Carbide and then 1970, because of labor union problems in this area and most of you that were raised here know, what I'm talking about, squabbles about who was gonna to do that and who was gonna to do that, squabbles and petty strikes, wildcat strikes, work stoppages. I was off work and my folks were off work for five months because of a strike by Local 211 of the Pipefitters. We had just finished one by the Operating Engineers Local 450 that shut down the powerhouse for a good length of time in which they were sued for loss of product by Dow Chemical and lost that suit—the Local lost the suit. We came back to work and I was meeted—and met there at the gate and say, "Hey, go on down to the office and we're gonna meet with you people" and here's what I was told—"Go ahead and finish the lump sum work (that's bid work) that you have but I want you right now, this is from Mr. Kinsel, to begin an orderly withdrawal of your people and your materials and your tools out of the blocks. Monical & Powell and union contractors are not gonna do our work anymore. Cardinal Construction, uh Power Systems, Payne & Keller will be doing our work."

Say, I cried and I seen men that worked for me cry. Now, listen, I've got friends in the union. I'm not antiunion and I'm not anti-anything. So we lost our jobs.

* * * * *

So we formed another company. But I was without a job. You say that sounds pretty sad? Well, that is sad. It's just that simple. Well, what you gonna do? Now I'm not gonna tell you today that the Dow Chemical Company is gonna cancel the contract. I'm not gonna tell you that because I can't. But, on the other hand, I'm not going to tell you that they're not. All I can tell you for a fact is our contract expires December 31st. That's it and uh what they do or what they don't do, I don't know but I'm asking you this, I think that you and I need to look around and we need to see what's going on. Now, I know that you've been told to drive down to the Gate—Gate 38 and look at all the union contractors listed there. Do that. Do that. And, then I tell you what I want you to do, I want you to drive down in to the clock room in Gate 38 and I want you to count and see how many people are clocked in. Last week there were approximately 90 and those were made up of specialists, electricians, calibrators and people who run the computers. Specialists. Then I want you to go to Gate 40 and count the cards there and approximately last week 1,400 open-shop people. Now count those. I think you need to do that. Among those there are no union janitors—contract janitors in anything. There are a very small number of union craftsmen. I have a friend that's a Union contractor and they run around 15 to 20—a very small number. Now that's not something that I've been able to determine. That's something that's been determined by the people that own these companies.

Now just for a moment I want to talk about you and I. Our contract as I said expires December 31st and the law says that Dow has the right to work a union or a nonunion job. They don't have to work either one. You say wait a minute, that's discriminating. Well, the law says that they can discriminate with contractors but they can't discriminate with people. In other words, I couldn't discriminate against you if you want to be union. I couldn't say, "Hey, I'm not gonna work you because you're union." That would be discrimination. But the Dow Chemical Company and any customer—large company like that—has the prerogative of saying under this Section 8(a)(3): "I don't want a union contractor. They have that right. Now don't blame me. I didn't write the law. O.K., so they can do that. That's legal. They can do that. Uh, I can't tell you that uh that they're gonna cancel the contract or as I said before nor that they—that they won't renew it.[13]

But let me say this to you. We have approximately 60 to—or 55 to 60 janitorial openings that we now fill with you folks and uh we don't have any other janitorial work to speak of. We have a few other contracts which work one or two people and so what does that say to you if Dow should cancel the contract. If Dow were to cancel the contract then you, as an individual, would need to find a job with the union. See if they can get you some work. You say, "Hey, I uh put me somewhere." I'd like to put you somewhere but I don't have 55 openings for janitorial people, you understand what I'm saying. Now I don't want you to misunderstand what I'm saying. I'm not threatening you with that but I am not saying Dow is gonna cancel the contract but if they do, I think you ought to understand what it is. We're strictly, uh—mainly, a mechanical and petrochemical construction company. We employ 1,400 people. We employ 50 to 60 janitors. You say, "what's that gonna do to you?" Well, hey, it's going to hurt you. I don't like to tell—I have fired—I—I tell you what—I don't know of anybody

[13] This is the point of most crucial controversy as to what Monical truly said. The General Counsel's version runs, "I can't tell you that they're gonna cancel the contract but as I told you before *they won't renew it*" (emphasis supplied). Noting that the entire thread and tenor of Monical's remarks was to plant the thought of a contract cancellation by Dow, but not to predict the consequence unequivocally, I find from all the circumstances that USC's transcribed version here is accurate and thus I accept it as fact.

> I've ever walked up to and said, "Hey, you're fired, get off the job." I'm not cut out that way. Whether you want to believe it or not, I am concerned about you and it would hurt me to have to come up and tell you, "Hey, we don't have any more work for you." It really would. And for you to say, "Well, what am I going to do?" Because I don't have the answer. I wish I did have one but I don't. But I'd say this. I know that you've been promised that you'll have jobs. You've been promised. I can't make you any promises and I'm not going to. But you've been told, "Hey, you'll have a job." Well, hey, before I said I'm gonna do that—I would check with those people that made those promises and I'd ask them this before I voted. "Where are you going to get me a job making four dollars and twenty-five cents an hour as a janitor, where? Hey, tell me where I'm gonna work?" Number 2, "Am I gonna have paid holidays? Am I gonna have that, yes or no?" "Will I be part of a profit sharing plan? Yes or no?" Now, hey, I'm not fooling or anything. You need to get those answers for yourself. I'm not gonna be voting. You are. And you need to have those answers before you make up your mind. Now if you decide to remain with U.S. Contractors without someone representing you, I think that, uh, U.S. Contractors—I pledge this: We will continue to do our best to get the most money that we can for the services that we do.
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>
> But I'll just say this in closing. I hope that you have listened to what the union folks have to say to you. I hope that you've listened to what I've tried to say to you today and what the others have tried to say to you too, on the way you vote tomorrow, and then vote the way you think is right. I would say this—that the janitorial contract work for the janitor work here at U.S. Contractors for the Dow Chemical Company is no longer in my hands. It's in your hands and I know that after you have weighed both sides of the story—listened to the facts—checked those facts for yourself—I know that you will vote right. I think the right vote is that you don't need anyone to speak for you. . . .

In keeping with the theory advanced in the complaint that Dow had acted in concert with USC respecting the alleged unfair labor practices, the General Counsel also educed evidence as to utterances made by Dow personnel. Smith testified that at a meeting held early in 1975 Dow's head of industrial relations at the time, B. J. Kinsel, remarked during a lengthy discussion of distributing needed maintenance work between bargaining unit employees and outside contractors that he would never allow a union contractor to have a 40-hour-a-week job embracing maintenance responsibility for the magnesium cells. Thomas Crow, longtime business manager of the Union, testified that at a political reception held in a country club during October he conversed with John Landry, Dow's former major manager over magnesium products, who said to him in apparent reference to the custodial employees of USC that just as Dow was getting its labor relations back on an even keel the Union had taken steps to mess it up by trying to organize an outside contractor. Mack testified that in August she had conversed about the Union while cleaning the office of Claude Bartlett, Jr., supervisor of cell restoration at Clorine B, who remarked during the discussion that if the contract custodial employees of USC went union they would definitely go out the gate. Carlson testified to several utterances of Dow's supervisory personnel. In the first of these on November 15 as she was talking with rank-and-file Dow employee Wallace, Dow group leader Pete Menegos approached them and said that Dow did not want a union contractor in the plant and had gotten rid of them in the past; that the eventuality of unionizing USC employees would only mean that Dow employees would be substituted for scrubbing and sweeping tasks. She also testified that in early December as she was on breaktime and talking alone with Dow Unit Supervisor Floyd Norton, he said that Dow would pull the contract if USC's custodial employees became unionized, and she should be cautious about this because Dow's resolve consistently to get rid of union contractors would mean she would be gotten rid of too. Carlson testified further that on January 26 she stopped while picking up trash to talk with the supervisory research specialist, Kirby Lowrey, Jr., who said in the conversation that Dow was planning on getting rid of USC custodial employees one by one with transitional replacement by Dow employees and ultimate utilization of a nonunion contractor.

As to these described exchanges with admitted supervisors, only Bartlett, Menegos, Norton, and Lowrey testified during Dow's presentation of evidence.[14] Bartlett remembered Mack as the regular custodian of his area and that during summer 1978 she frequently told him of job problems with USC, asking whether organizing its employees meant anything to Dow. Bartlett testified that he disclaimed any controlling knowledge but that Dow was an open-shop employer and the difference between union and nonunion contractors had a bearing on the outlook, a notion he explained in cross-examination as meaning that in such negotiations the unpredictability of the situation could affect whether or not people like Mack would continue to have a job. Menegos recalled the incident about which Carlson testified. From his standpoint it began as he insinuated himself into a discussion about unionism in which Carlson was engaged with two employees of his unit, who should have been absorbed in their duties at the time. Menegos flatly denied the statements attributed to him, maintaining that he only spoke in delicately friendly terms to ease her out of the work area. He did, however, admit to once telling a fellow Dow employee that USC janitors would lose their contract if they went union. Norton testified that during

[14] Testimony of Dunlap about remarks made by Dow employees Hudson and McCater is disregarded because they were authoritatively identified as rank-and-file personnel, for whom no evidence was advanced to connect their personal opinions to Dow in its capacity as a respondent here.

December Carlson was the regular janitor for his area and that he frequently chatted with her. He recalled an episode in December of approaching Carlson when she was in conversation with Dow bargaining unit employee Art Wallace. Norton's immediate impression of this was Wallace ribbing her about the union activity then underway, and embellishing his remarks with prediction that, should the custodial employees of USC organize, their contract would be pulled by Dow. Under this impetus Norton sat down, and while denying Carlson's testimony he was unable to state whether he chimed into Wallace's remarks by indicating what he said was possibly right. Lowrey testified that, employed in January, Carlson was vaguely known to him as the person regularly cleaning his office. He emphasized that she frequently initiated unwelcome discussion about her desire to unionize, and sought to prompt him into articulating something on the point of whether this would cause Dow to react in any manner. Lowrey asserted that he pointedly avoided expression of any opinion as he considered her meddling bothersome. He denied making any utterance resembling what Carlson attributed to him on January 26. Bartlett, Menegos, and Lowrey also each testified categorically that they had no authority to determine retention of outside contractors, nor did Dow management consult with them on the subject. Norton testified that his job simply brought no involvement with Dow's contracting program.

Explanation of certain contracting details was made by purchasing agent Lynn West, an 11-year incumbent of his position. He testified that prequalification information is gathered on prospective contractors, that fundamentally a system of competitive bidding obtains, and that Dow prefers to familiarize themselves with the performance of untested contractors by awarding such newcomers only lump sum work. His department candidly advises union (termed "fair" by Smith) contractors that they are competing with nonunion (often termed "open shop") firms.

An official of Dow's had originally solicited Monical to submit a bid for janitorial service, and this was done. The first award of late 1972 was continued by successive purchase orders which in recent years came to be monitored by West. He testified that the latest purchase order, A & B - 64337-PO9, was routinely issued to USC on December 29 with West's name shown as the buyer.[15] As in all past years West had no role in actually scheduling custodial services, for this was the responsibility of operating management.[16]

Shortly after this renewal, a series of interrelated events and correspondence ensued. They began when Monical advised Smith in early January (as he had promised to do) that USC's custodial contract was renewed. This practically coincided with issuance of the Union's certification, and the parties to this newly legitimatized bargaining relationship scheduled their first negotiation for January 22. It took place at USC's office in Clute with Smith, Anderson, and Carlson representing the Union while Monical and Rea represented the employer. The Union submitted a complete written contract proposal other than for wage rates, and the entire matter was taken under advisement by Monical who said he would have an attorney review it.

Contemporaneous with this Rea had calculated the extraordinary cost of legal services and related expense attendant on the representation petition. He testified that this resulted from a request of USC's board of directors after the traditionally modest profits of the janitorial contract (accounting-wise geared to a fiscal year ending each May) abruptly turned to loss beginning in October, and amounted to over $26,000 for the last 3 months of 1978 (USC's fiscal year 1979).[17] In consequence of this Rea authored a letter for the signature of Monical, and this was sent to Dow on January 18 with express reference to the new purchase order. It read:

> This letter is to notify you of the necessity for us to re-open the matter of compensation to U.S. Contractors, Inc., both as to the manner in which USC is to be reimbursed for its overhead expenses and the amount of such reimbursement.
>
> At the time this contract was negotiated, USC had no legal expense and anticipated no legal expense which could be attributed to its performance under the referenced purchase order.
>
> In the past four months, as a result of certain governmental hearings held and payments made or anticipated as a result of such hearings, USC has been placed in the position of having to perform under a purchase order which has no profitability and in fact is presently operating at a loss.
>
> This loss is attributable directly and only to the increase in overhead expenses consisting of legal fees, additional duties assigned to supervision, travel costs and added clerical and accounting costs.
>
> For these reasons alone it is necessary that we ask (1) that the provisions of the contract be amended to provide that a fee be paid based on direct labor employed under the applicable purchase orders and (2) that the fee be set at 14.4% of the amount of straight time labor.
>
> We ask your immediate attention to this very serious matter and request a meeting at the earliest possible time.

This letter was initially routed to West. He passed it on immediately to his manager of purchasing, who in turn caused it to be set down for review before the contract committee of Dow's purchasing department. West testified that the 14.4-percent increase was inherently very unusual because of its magnitude. The upshot was reflected in a letter dated January 30 sent from West to the attention of Monical at USC which read:

[15] The customary Exh. A attached to this purchase order established a straight time man-hour rate of $5.70 for weekly total up to 1,000 hours, $5.65 for weekly total of 1,001-1,800 hours, $5.60 for weekly total of 1801-3,000 hours, and the amount of $5.55 above that.

[16] At this point in time a few janitors remained employed by Dow from the attrition process that followed after most custodial service for the complex went to the outside.

[17] Actual profit/(loss) figures for this 12-month period were: $4,092 in June (1978); $3,433 in July; $4,199 in August; $4,188 in September; $10,316 in October; $10,129 in November; $5,986 in December; $13,720 in January; $4,400 in February; $272 in March; $2,932 in April; and $765 in May, for a resultant annual loss of $23,808.

> Your letter dated January 18, 1979, requesting increased compensation has been studied carefully.
>
> Based on the stated reason that you are currently operating at a loss, we have decided to temporarily grant this increase in order to insure continued janitorial service at our Plant B location. However, be advised that we are currently evaluating other janitorial services and plan to make any necessary changes at the earliest advisable date based on sound business considerations.

West also immediately issued an amendment to the basic USC purchase order effective January 29, specifying a 14.4-percent fee of the actual direct straight time labor charges from that point onward.

In the interval between this exchange of correspondence Dow had in fact contacted J & L Janitorial Services and Barron Construction Company, inviting each of them to submit bids for janitorial service at Plant B. Over the period January 23 through February 1, J & L submitted three separate proposals, refining each of them in terms of observations made by West to J R. Lyster, president of J & L, with respect to what would actually tend to justify an award. A summary of West's, prepared on February 1, showed the final J & L bid amounting to $36.15 total crew hour based on a supervisor at $6.60 per hour and five janitors at $5.90 per hour with all insurance included in the figure. On February 2 purchase order A & B-64492-PO9 was issued to J & L on the authority of West for the furnishing of janitorial services at Plant B as and when requested. This document was specified to be effective through December 31, 1979, and otherwise differed on its face from that in effect for USC in not carrying a provision of the contractor's insurance being in accordance with a certain "coordinated insurance and risk management" plan often utilized by Dow with subcontractors. As to Exhibit A, in which the details of contract implementation were contained, the award to J & L differed from that for USC primarily as to hourly rates to be paid the persons performing service, the identification of "transportation" as an included item in the rates, and an equipment rental clause of cost plus 5 percent in lieu of the dollar schedule shown for this subject as it applied to USC. Additionally, the USC Exhibit A specified that it was to be reimbursed for actual statutory assessments for payroll taxes, an item on which J & L's award was silent in keeping with its final proposal quoting rates that specifically included "all fees." Beyond these differences the proposals were comparable in regard to significant matters of handling overtime work, identifying the beginning of workweeks, responsibility for providing expendable supplies and miscellaneous material, the holidays to be observed, and a reimbursement clause for meals taken on overtime. Based on the award to J & L, that firm was scheduled to begin custodial coverage of Plant B's A. P. Beutel building with the six-person janitorial crew commencing Monday, February. Officials of USC were informally advised of this at a time contemporaneous with West's letter of January 30 and amendment to the purchase order.

Rea testified that he then authored a letter for the signature of Monical which was sent to Dow on February 6. It stated:

> In our recent letter of January 18, 1979, we detailed to you, that beginning in September 1978 our overhead expenses were substantially increased over and above anything contemplated by the parties in the Exhibit "A" to our purchase order. We requested that we receive an additional 14.4% of the amount of straight time labor in order to compensate us for those additional expenses.
>
> It was our contemplation that such increase would be effective with the commencement of the anticipated expenses, to wit: September 1, 1978. However, your recent addendum of February 1, 1979 purports to be effective commencing January 29, 1979. This addendum fails to compensate us in the manner contemplated in our proposal.
>
> Accordingly, we are submitting to you our invoice based upon a beginning date of 9/1/78 as contemplated in our proposal.
>
> We further want to express our concern over your recent action in terminating our services in the A. P. Beutel Building which has historically been performed by our employees. Obviously the continuation of performance of services in roughly the same volumn as was contemplated at the time of our January 18, 1979, letter is essential for us to continue to perform work at the 14.4% fee set forth in that letter.

West testified that the Dow purchasing department simply considered and rejected the request for retroactivity, and on that basis he sent a letter dated February 13 to Monical's attention reading:

> Your letter dated February 6, 1979, and attached invoice has been received and evaluated.
>
> Based on the fact that we did grant a substantial increase as evidenced by Addendum dated February 1, 1979, we feel your request for a retroactive increase is inappropriate. We, accordingly, hereby reject this request.

As this was happening user personnel of Dow, in consultation with its purchasing department to whom USC was communicating its operating rationale at the time, determined to expand the services of J & L. Lawrence DeZavala, a contractor liaison official, notified USC of such changes and these were promptly confirmed in writing by Monical. The first of five such letters was dated February 9, written by Monical to the attention of DeZavala at Dow. It read:

> This is to confirm your verbal notice to our superintendent, Ron Steinbach, of Dow's intention to reduce the amount of janitorial work assigned to U. S. Contractors, Inc. as follows:
>
> 1. February 9, 1979, will be the final day for U. S. Contractors, Inc., to perform janitorial work in

Buildings 201 and 203 and in Blocks 1700 and 4000.

2. February 16, 1979, will be the final day for U. S. Contractors, Inc., to perform janitorial work at the Lanier complex, Building B101 and Annex, Industrial Medicine, Buildings B114, B120, B122, B124 and B204.

If our understanding of your instructions as outlined above is incorrect, please notify us as soon as possible.

As it happened, West's letter rejecting the retroactivity request was received in business mail the very morning of a scheduled negotiation with the Union. In this regard, Monical, Harton, Rea, and Attorney James Neel had assembled at company offices by 8 a.m. to discuss their bargaining position for a scheduled 10 a.m. meeting at a nearby motel. At 9 a.m. West's letter was brought in to Monical, and its terms generated a new outlook on the entire situation. Monical (who was scheduled to be replaced by Barton as part of the employer bargaining team) testified that, in view of business losses sustained to date, the anticipated reduction of approximately 700 man-hours from the normal past weekly range of 1,800 to 2,000, and Dow's denial of the requested reimbursement, decision was reached on the spot simply to cancel out of the Dow contract. Barton echoed this theme in testimony emphasizing the imminent loss of hours, the knowledge that Dow was seeking other providers of janitorial service, and the spectre of proportionately higher overhead as workload decreased into the future. Rea also testified about this decision, emphasizing how the operation appeared chronically unprofitable by then, and how Dow's denial of retroactivity was essentially the triggering reason for USC to relieve itself of this particular contract.

Once this decision was made, Neel immediately instructed on the need to offer the Union a right to negotiate both on the cancellation and its effect. As so educated, the employer bargaining team traveled to the meeting place where Smith, Anderson, and Carlson were present for the Union. After amenities, Neel chiefly carried the discussion by recounting how USC had originally gotten into the custodial business as an accommodation for an esteemed customer, and that circumstances had brought about a loss of work and such unprofitability that a cessation of the custodial business was contemplated. Rea testified that Smith seemingly criticized Dow for reducing available work, but disdained any opportunity to discuss the situation further. Smith recalled his response to this notification simply being that union attorneys would make further contact. The meeting thus ended abruptly, and later that day Monical signed a letter to the attention of West which stated:

> Please be advised that we desire to terminate Purchase Order A & B 64337-PO9 and Exhibit "A" thereto effective at your convenience, but no later than March 17, 1979.

By letter also dated February 14, Neel wrote to Smith as follows:

> This is to confirm our negotiation session of this date in which we advised you it was our intention to terminate our relationship with Dow Chemical Company in connection with the janitor work theretofore performed.
>
> Attached is a copy of a letter which was on this date forwarded to Dow regarding same.

On February 16 Smith wrote to Monical expressing surprise and confusion over the suddenly announced decision to discontinue custodial work at Dow, terming his understanding of the decision as one which USC reached because it was seemingly "not worthwhile to continue." Smith made a comprehensive request for documentation concerning the contractual relationship with Dow and any pertinent verbal communication on the matter. Smith also formally requested a statement of the reasons and circumstances for canceling. On February 22 Neel replied to Smith as follows:

> Your recent letter of February 16, 1979, addressed to Mr. Lynn D. Monical has been referred to the undersigned for answer. Your letter refers to a meeting on February 12, 1979, in which you assert that your organization was specifically informed that U. S. Contractors, Inc. concluded to discontinue performing janitorial services for The Dow Chemical Company.
>
> In the meeting, which in fact occurred on February 14, 1979, the Company specifically reiterated that its strength and expertise was in general plant maintenance and construction work in the petrochemical industry and that it was never its desire to be known as a janitorial subcontractor. We detailed the history of U.S. Contractors' involvement in the custodial business at Plant B of the The Dow Chemical Company, Texas Division: that its entry into that line was occasioned solely as an accommodation to a valuable customer.
>
> We explained that since February, 1978, the Company is now performing substantially less oustodial work per week under its purchase order. We advised that since January, 1979, U.S. Contractors had been removed, or had been advised of its imminent removal, from certain specific custodial work theretofore performed, which amounted to in excess of 700 hours of weekly work. We also stated that we had been advised by representatives of Dow that they were currently engaged in evaluating other janitorial services and that it was obvious to us that by their actions, Dow no longer desired our services as a custodial contractor. You confirmed independent knowledge that Dow was actively engaged in pursuing other sources for its custodial services in Plant B.
>
> We told you that as a result thereof, we intended to give notice to terminate our purchase order for custodial services and offered to discuss this matter with you. You specifically rejected the need for any further discussion with respect to any matter pertaining to our desires to terminate the agreement by stating that there was nothing further to discuss.

> After the negotiation session with your committee, we notified The Dow Chemical Company, Texas Division, of our termination of the custodial agreement and sent you a copy of such notification. In view of the foregoing, we see absolutely no relevant legitimate purpose in the information sought by your letter of February 16, 1979.
>
> As you have previously been advised, we would appreciate your directing further communications with the Company to the writer.

This was followed by a rapid series of letters dated from February 23 to March 9 following the general format of the initial one in this series dated February 9, by which Monical confirmed Dow's verbal notice of sequentially establishing final days in which USC was to service any of the several dozen buildings previously covered. Each reduction was coextensive with J & L taking over the custodial function, and in consequence USC's complement of employees quickly dwindled over that same period of time. The final workday of any USC bargaining unit member was March 16, although several sought and obtained continuing employment with J & L.

I initially treat matters of credibility. Roddy was generally unimpressive and plainly attempted to minimize the essentials of what was attributed to him in various conversations. For this reason, coupled with satisfactorily persuasive demeanor of Hall and Dunlap, plus one even more convincing of Mack, I find that he spoke as described to custodial employees under his supervision while grouped in a van and to Dunlap alone, all prior to the election. Only a slight gap exists between the respective versions of what Kalmans told Beasley when conversing in a company office; however, it is actually immaterial because Beasley's immediate dissemination of her comprehension to employees was violative in itself.[18] A Mack/Bartlett conflict also exists, and here demeanor factors favor this witness of General Counsel, the notable fact that Bartlett voluntarily revealed how his remarks expressly associated unionism of a work force with uncertainty about whether jobs would continue. The more significant resolution concerns Carlson, whose testimony attributes telling admissions to agents of each Respondent. I am convinced that Carlson has compromised the truth for partisan purposes, and has invented or grossly distorted the several key conversations about which he testified. She was effectively contradicted by Dow personnel Menegos and Norton, and by Roddy who in this specific instance I credit as to whether he ever even spoke with her in early January. The key is Lowrey, however, whom I find to be a superbly credible witness of fine demeanor, candor, and perception. His testimony gives ample basis to find, as I do, that Carlson importuned shamelessly as she moved throughout the Dow complex in an unworthy effort at creating "weak moment" situations and exploiting ordinary interpersonal courtesies. Lowrey's testimony is vivid on this point in credible reference to attempted prompting and the "wrath" felt by other personnel, a hyperbolic reference to her habitual dallying and interruptions. It is also noteworthy that Art Wallace, a person identified as within the Union's bargaining unit, was not called as a witness concerning the controversial Norton/Carlson episode in a plant lunchroom during December, nor was the absence of his testimony in any manner explained.

With regard to Respondent Dow this leaves two utterances as prelude to evaluating its claimed action in concert with USC. They are each remote, ambiguous, inconsequential, and utterly lacking in merit as indicators of a large industrial firm's business policy. The fundamental context that must not be overlooked here is that of a major bargaining relationship.[19] It is matured by passage of time and imbued with the ordinary familiarities of persons who serve institutionally as adversaries. Conversation between such persons is often laden with jocularity and bravado, these being the only characteristics to what Kinsel and Landry uncontradictedly said. There is total failure to connect such remarks to actual workings of Dow's labor relations or contracting policies, and the Kinsel remarks implied the well-known background of labor strife as devastatingly experienced around this complex in the earlier years of the 1970's.[20] An even more innocuous character attaches to Landry's mild jest, particularly given the convivial setting in which it took place. Thus, I discount this aspect and move to the more salient area of whether other probative evidence exists to show Dow in cahoots with USC. There is literally none.[21] Dow had no interest in the representation pro-

[18] While Kalmans may have articulated lawyerlike shadings to his remarks, the essence was plain enough, particularly when his final description was to concede being personally of the opinion that Dow had an unfettered right to discontinue service by newly unionized employees.

[19] Lee Wilkins, Dow's manager of labor relations, recounted that in 1978 contract renewal negotiations with the Union the parties "finished up early" for the first time. Smith agreed to the achievement even without mediation assistance, and tacitly conceded "very good relations" with Dow.

[20] Dow introduced a November issue of official labor news published by the Texas AFL-CIO, in which Secretary-Treasurer Sherman Fricks essayed the concept that trade unionism in the area had created many of its own problems. Fricks is himself actively involved in dealings with Dow, and again there was failure to call him for any explanation that might neutralize his observations nor was he claimed to have been unavailable. The following are certain excerpts from this article:

> Ten years ago, we did 75-80 percent of the major construction work in the Houston Ship Channel area. Today, we do 13.78 percent.
>
> * * * * *
>
> Poor workmanship and wildcat strikes have done us in. Petty squabbling over which union has jurisdiction has removed us from the picture.
>
> How can we call Dow Chemical a rat company that's out to bust the unions? Dow *begged* us over and over again to stop all that silliness and come in and do the job right. But we wouldn't listen. Dow finally threw up its hands and said it had no choice but to hire nonunion labor.
>
> They'd *still* rather deal through us . . . .

[21] The credited or admitted utterances of two (from among the 600) first-line Dow supervisors are unavailing as indicators of motive. In both instances nothing was involved beyond random, unguarded expression of personal opinion. Bartlett's statement was isolated, remote in time, and oblique insofar as even constituting a threatening statement of prospective job loss. Norton's gratuitous contribution to a conversation being instigated by Carlson was vague to the point of inconsequentiality. Neither utterance has the character of an unfair labor practice, nor warrants any remedial action.

ceeding beyond general community awareness of its responsible functionaries.[22] West, the bellwether respecting this fundamental issue, was also specifically aware of the reality that unionized contractors could experience work stoppages more readily than those having a nonunion work force; however, this is balanced both by his perception that factors other than unionism could destabilize a contractor and the generally evenhanded treatment he has given to the dwindling number of union contractors available to Dow for its comprehensive needs.[23] West's thorough description of his department's inner workings is quite expectable as a component of this enormous enterprise. His fidelity was to Dow alone, and aspersions as to why it would be interested in alternative sources of supply the moment any suspicious waffling was shown in an established contractor are naively misplaced. There is little profit in dissecting the comparative cost amounts that West received after bidding was sought for custodial work, yet even here the prudent choice was J & L. It is also satisfactorily explained that a typical cost adjustment was approved in August 1979, and that the Ramirez Company is maintained as a balancing source of custodial labor for Plant A and the leading manifestation of Dow's delicate obligation in the realm of contracting with minorities. Overall a pure arm's length business relationship existed, colored only by familiarity between persons long accustomed to settled dealings. Beyond this Dow received the critical letters from USC with sophisticated aplomb, and reacted only in its corporate best interests.[24]

Plainly the culprit here is USC. I firmly believe that it was determined to resist the prospect of its custodial employees becoming organized, and followed through with carefully orchestrated strategies to effect this aim.[25] The imagination in execution was such that this objective was not fully revealed until the crucial morning of February 14, when events and their followup make this appraisal a most compelling inference. There is, however, varied background that also hints at the conclusion. The hiring of Roddy has no real explanation beyond the apparent desire to have a "heavy" in close touch with custodial employees to fulfill one branch of this strategy. This role Roddy filled, and I find his utterances to be unlawful coercion of employees by reason of their unremitting installation of fear that jobs would be lost for doing no more than exercising free and lawful choice under Section 7 of the Act. A much more striking phase of evident strategy is the speech of Monical on December 27. This seemingly rambling, folksy harangue was in essence a diabolically contrived vehicle to permeate the entire work force with an unfounded fear that giant Dow would snuff out their livelihoods should they vote in the Union. This effect practically leaps from the pages of USC's own version of his talk. Without any objective basis for thinking that continuation of his custodial contract was in jeopardy, Monical pointedly said this on three separate occasions (as transcribed in this version *supra*). In addition, the theatrical-like projection to the ceiling of *Malbaff* passages lent a patina of inevitability to the whole notion.[26]

The election victory of the Union was swallowed with apparent equanimity by USC. However, that must be taken in light of what was soon to follow.[27] Monical took the lead in the bargaining session of January 22 as

[22] The General Counsel's theory of collusion is weakened by the fact that Dow renewed the custodial contract on the very day following the Union's emphatic selection by employees of USC. No better time would have presented for delay or subterfuge, had that been Dow's intention.

[23] Key Associates, Seaboard Constructors, and Rald Industries were each credibly identified as union contractors on renewing cost-plus work of a magnitude that would probably cause one or more of them to have employees at the complex to a combined level 40 hours per week. In fact, this phenomenon is merely illustrative of the open-shop movement. Several theories are held as to impetus, status, and prospects for the subject. It is variously attributed to a push for minority employment in the domestic construction industry, reportedly prohibitive costs of bidding with anticipation of employing union labor, entry of nontraditional employees into the field, and changing ethics among those aspiring to be construction workers. The subject is of at least decade-long evolution as indicated by trade journal articles of the late 1960's. "Open Shop Group Urges Labor Changes," Engineering News-Record, October 24, 1968, p. 81, reported the 11th Annual convention of the Associated Builders and Contractors, Inc. (ABC), the national association of merit (open shop) contractors, as then claiming 2,300 member firms in 18 States.

The following year brought "The Open Shop Voice Grows Loud and Clear," Engineering News-Record, November 27, 1969, pp. 44-46 reporting growth of ABC to 200 chapters and the AGC's (Associated General Contractors) "first national open shop conference," one "publicly recognizing the fact that 35 percent of its 9,000 members operate open shop." During an address to the Sheet Metal and Air Conditioning Contractors' National Association, Edward J. Carlough, president of the Sheet Metal Workers International Association, AFL-CIO, proposed attitudinal changes, elimination of jurisdictional disputes, and wage scale realism in the context of slackened competitive position of union contractors and curtailed employment opportunities for members of his labor organization. "Contractor Relations on Upgrade: Union Seeks 'Drastic Changes' to Compete Against Open Shops," Air Conditioning, Heating & Refrigeration News, November 8, 1976, pp. 5-6. The passage of time has simply heightened awareness of this subject, as illustrated by the feature cover story updating status of open-shop or double-breasted operations, which were thought to now constitute a "majority of all construction in the U.S." "Open Shop Construction Keeps Growing Bigger, Getting Stronger," Engineering News-Record, October 27, 1977, pp. 20-24.

[24] Extensive efforts were mounted during the hearing by both the General Counsel and the Charging Party to capitalize on the doctrine of "chilling unionism" as this theory was framed in pars. 24 and 25 of the complaint by allegations pertaining essentially to Dow. See *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965). Since I propose to dismiss all claim of unlawful conduct by Dow, no aspect of *Darlington* doctrine need be analyzed.

[25] I note that USC was represented by current counsel from the inception.

[26] *Local 447, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Malbaff Landscape Construction)*, 172 NLRB 128 (1968), was a CB case involving esoteric reasoning in terms of the object of certain picketing, with the focused language serving to round out a rationale directed to the significance of secondary activity under Sec. 8(b)(4) of the Act. In deciding this case the Board's opinion states, at page 129, "But an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees." Monical had used this particular language in dramatizing his own message. Preoccupation with *Malbaff* is misplaced, for even in recent *Pipeline Dehydrators, Inc.*, 239 NLRB 172 (1978) (a CA case in which no violation was found when an employer assigned work in the face of a bona fide juridictional dispute), the Board noted how 8(a)(3) principles have long been held inapplicable to sections of the Act dealing with employer rights.

[27] I note the prompt disposition of an earlier CA case by settlement at such point in time and, while assuming this to be merely one step in the grand design, do not in any manner rely on the event both because of the nonadmission clause contained there and because it is unnecessarily speculative to do so.

he disarmingly gathered up the Union's proposal with propagandized remarks about his inexperience in collective-bargaining matters. Rea entered the scene next as the finance person ostensibly recommending that only through recoupment of the extraordinary legal costs just incurred could a continuation in the custodial business seem justified. When Dow routinely chose to honor the 14.4-percent add on request, USC went to the astonishing extreme of seeking retroactivity. This guaranteed a rejection by Dow and an excuse to carry out the long-planned objective. I construe it to be mere coincidence for Dow's answer to appear on the very day USC was scheduled to deal again with the Union.[28] With experienced labor counsel on hand at the moment and the entire plan long since fleshed out, it was only a matter of adjustment to rehearse the last act before meeting with the Union and delivering news of the decision, clouding it over in the process with an insincere gesture toward *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964). The result was utter elimination of an ongoing work force, and a manifestation of the most totally hostile and pervasive unfair labor practices that could arise.

Accordingly, I render conclusions of law that USC, by threatening its employees with loss of their jobs for selecting the Union as collective-bargaining representative, by discharging its entire custodial work force and by sham dealings with the Union following its certification, has violated Section 8(a)(1), (3), and (5) of the Act, but that Dow has not violated the Act in any manner. Since I have found that USC has refused to bargain collectively in good faith with the Union as the representative, duly certified by the Board, of an appropriate collective-bargaining unit of its employees, and in order to insure that these employees will have the opportunity to enjoy the full benefits that may be derived from their selection of a bargaining agent as contemplated by the Act, I recommend that the initial year of certification be deemed to begin on the date that the Company commences to bargain in good faith with the Union as recognized representative of the employees in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962).

[28] It is important to reiterate here that absolutely no evidence exists to show that West or any other agent of Dow was privy to the scheme, or slanted their official functioning in any manner whatsoever. The failure of USC to gain retroactive reimbursement of costs from Dow is unrelated to whether it should continue as a going business on a reduced basis. Notably Roddy's resignation was already in hand, a development neatly harmonizing with prospective need for less supervision.

REMEDY

In the course of blatant conduct by USC which swiftly eliminated an established component of its business, and the complement of employees who had constituted themselves into a bargaining unit, a major new relationship arose between Dow and J & L, one that may not be disturbed because it was entered into in the regular course of lawful business. For this reason the *status quo ante* is not restorable, and a remedy must be fashioned to address best the actual situation which now prevails.

The first interest is that of making whole, insofar as possible, those persons who suffered directly from the unlawful conduct. Thus the recommended Order shall provide that should USC resume furnishing custodial services in the future it shall preferentially offer employment to each former member of the Union's bargaining unit based on their past continuous length of service. Absent this eventuality USC shall pay back wages to all such persons until so reinstated or until such time as they have obtained regular and substantially equivalent employment within the meaning of Section 2(3) of the Act. The second interest, that of the Union, shall be observerd by treating its certification as presumptively operative into the indefinite future, and coupling this presumption (rebuttable) with full reach of a *Mar-Jac* certification year whenever that period might start to run. Considering the enormity of Dow's operations, including a facility unrelated to this case at nearby Oyster Creek, and intending to give fullest possible sweep to remedial aspects of this Decision, I shall deem that the Union's certification is inherently valid throughout and near to the Texas county in which USC has historically concentrated its activity. Further, the notice to employees which I shall compose must be mailed immediately to the last known address of each person affected by USC's prohibited conduct under Section 8(a)(3). Finally, the extensive, pervasive character of unfair labor practices herein justifies a broad cease-and-desist order applying to all facets of USC's enterprise. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]